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No. 05-1076

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

KEVIN Y. PADOT,

Petitioner,

v.

BRENDA G. PADOT,

Respondent.

On Petition For A Writ Of Certiorari To The Second District Court Of Appeal Of Florida

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

In her Brief in Opposition ("Op. Cert."), Respondent essentially concedes the significance of the issues presented and the manifest division of authority among state courts in the construction of the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408, and Veterans' Benefits Act (VBA), 38 U.S.C. § 5301, prohibition of treating military disability pay as marital property divisible upon divorce. Respondent submits, instead, that the Florida appeals court decision was substantively correct on other grounds not implicating the Constitution's Supremacy Clause.

Without presaging the merits of the issues raised here (in the event that this Court, in the wise exercise of its discretion, grants review), Petitioner disputes the factual and legal premises of Respondent's contentions. This case remains an excellent vehicle for this Court to resolve the festering disputes implicating the interplay of federal and state law in the handling of military disability pay in divorce proceedings.

1. A consistent theme of Respondent's submission, see Op. Cert. 1, 6, 8-9, is that the preclusive effect of USFSPA, and this Court's decision in *Mansell v. Mansell*, 490 U.S. 581 (1989), is not present when a military member is still on active duty when divorced. In other words, Respondent suggests that when the "waiver of retirement benefits in lieu of disability pay occur[s] post-judgment," Op. Cert. 1, then federal law somehow does not apply.

This contention has no merit. Under controlling federal law, an entitlement to disability pay can only arise after separation or retirement from the military. See 38 U.S.C. § 1131, 5110(b). More importantly, USFSPA's prohibition on treating disability pay as a part of "disposable retired pay" for

purposes of division upon divorce, 10 U.S.C. § 1408(a)(4)(B), makes no distinction as to the timing of the divorce in relation to the date of retirement (and the receipt of either retired or disability pay). Lastly, there is nothing in the *Mansell* decision itself that would suggest that its holding is limited to situations where the servicemember has been drawing military disability pay prior to divorce, as opposed to cases where (as here) a divorce and property settlement occurs, a servicemember retires, and then later (by operation of federal law) the veteran waives a portion of retirement pay in favor of receiving disability pay.

Respondent relies on the Maine Supreme Judicial Court's holding in *Black v. Black*, 842 A.2d 1280 (Me. 2004), that USFSPA does not limit the authority of a state court to grant postjudgment relief when military retirement pay previously divided by a divorce judgment is converted to disability pay, so long as the relief awarded does not itself attempt to divide disability pay as marital property. As Petitioner has already noted, Pet. 17-18, the *Black* ruling has been contradicted by the highest courts of six other jurisdictions. See *Ex parte Billieck*, 777 So. 2d 105 (Ala. 2000); *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992); *Ashley* v. Ashley, 990 S.W.2d 507 (Ark. 1999); *Matter of the Marriage of Wherrell*, 58 P.3d 734 (Kan. 2002); *In re Strong*, 8 P.3d 763 (Mont. 2000) *Ryan v. Ryan*, 600 N.W.2d 739 (Neb. 1999).

2. Respondent suggests, Op. Cert. 1, 9, 10-11, that because Petitioner has other sources of income to offset the Florida court's order that he remit a portion of his disability pay, that somehow this removes this situation from the relevant provision of the VBA prohibiting an assignment of veterans' benefits. See 38 U.S.C. §§ 5301(a)(1); 5301(a)(3)(A). Respondent asserts that there has thus been "no 'major damage' to 'clear and substantial federal interests'." Id. at 11 (quoting *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979)).

But this Court's ruling in *Hisquierdo* expressly rejected the notion that the anti-attachment provisions of federal benefit statutory schemes (as with Railroad Retirement Act, at issue in that case) can be circumvented by the simple expedient of arguing that an offsetting award can be made against the former spouses' *other* assets. This Court held "[a]n offsetting award, however, would upset the statutory balance and impair petitioner's economic security just as surely as would a regular deduction from his benefit check. The harm might well be greater." 439 U.S. at 588. Respondent's contention, that this case does not factually implicate the VBA, has no merit.

3. Respondent also argues, Op. Cert. 7, 12-13, that there is some sort of "equitable" exception to this Court's ruling in *Mansell* and its application of USFSPA in prohibiting the allocation of military disability pay to the marital estate. Moreover, Respondent suggests, because Petitioner agreed to not "take any action which shall alter or otherwise reduce the interest of the other party in the . . . retired pay. . . ," Pet. App. 17a, Florida courts are somehow justified in equitably estopping him from taking military disability pay.

This, of course, begs the question presented by Petitioner, see Pet. (i), 11-13, whether this Court's decision in *Mansell*, see 490 U.S. at 586 n.5, properly read and understood, sanctions a wholesale "*res judicata*" or "equitable" exception to its holding. Respondent concedes, as she must, that there is no express indemnification provision in the marital property decree, and that no mention is made of allocating disability pay. See Pet. App. 7a-8a. These are factors that may have counseled against this Court granting review in similar cases, see *Shelton v. Shelton*, 78 P.3d 507 (Nev.), *cert. denied*, 541 U.S. 960 (2003); *Seddio v. Michaels*, 529 U.S. 1068 (2000) (denying review of an unreported Texas decision), but are not present here.

Respondent's reliance, Op. Cert. 8-9,12-13, on such cases as *Janovic v. Janovic*, 814 So. 2d 1096 (Fla. App. 2002), *Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001), and *Black*, 842 A.2d 1280 (Me. 2004), if anything, illustrates the level of incoherence in state court decisions construing *Mansell* and USFSPA's provision barring the use of disability pay as "disposable retired pay." These cases appear to stand for the proposition that state courts may freely ignore the strictures of federal law, so long as they are achieving an "equitable" result in enforcing marital property decrees. Moreover, these courts – along with Respondent, see Op. Cert. 7, 8 – appear to characterize the former spouse's receipt of future military retired pay as a "vested right," an interest that state courts can enforce even in the teeth of federal prohibitions. This flies in the face of the reality that veterans, like Petitioner, are not themselves "taking any action" to diminish their spouse's receipt of retired pay. This is being accomplished, rather, by operation of federal law. Respondent's attempt to foist a broad, equitable exception to the operation of federal law should be unavailing.

4. Finally, Respondent emphasizes, Op. Cert. 6-7, 10-11, the natural presumption against the federal preemption of state law in the context of domestic relations. Petitioner is mindful of the high bar set by such cases as *Hisquierdo*, 439 U.S. at 581, and *Rose v. Rose*, 481 U.S. 619, 625 (1987). Petitioner would submit that the clear terms of USFSPA and VBA qualify as a "positive require[ment] by direct enactment," preempting contrary state family law, and that state court refusals to comply with the prohibition against encumbering military disability pay constitutes "'major damage' to clear and substantial federal interests." Id.

Any doubts on this point have been settled by this Court's consistent jurisprudence that when Congress legislates uniform duties, immunities, and benefits for this nation's

military personnel, such reflect "substantial federal interests" which demand preemption of contrary state law. See *United States v. Shearer*, 473 U.S. 52, 58, n.4 (1985) (in discussing *Feres* doctrine, this Court concluded that "it would be anomalous for the Government's duty to supervise servicemen to depend on the local law of the various states"); *United States v. Standard Oil Co.*, 332 U.S. 301, 305-07 (1947). Even more pertinent is this Court's discussion in *McCarty v. McCarty*, 453 U.S. 210 (1981), where it was noted that "it is manifest that the application of community property principles to military retired pay threatens grave harm to 'clear and substantial' federal interests." Id. at 232. That was also the clear import of this Court's decision in *Mansell*.

By whatever standard of preemption this Court chooses to employ, Petitioner has raised a clear case of a substantial national interest being subverted by fractured and tortured state court interpretations of controlling federal statutes and decisional law.

CONCLUSION

For the foregoing reasons, and those previously presented, the petition should be granted.

Respectfully submitted.

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May 2006